Supreme Court, U.S.
FILED

No. _____ 93 1510 MAR 16 1994

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

Petitioner,

v.

GREGORY ALLEN BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION OF THE STATE OF ALABAMA

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39 pp

QUESTIONS PRESENTED

I.

Whether this Court should grant certiorari to resolve conflicts among the lower state and federal courts as to what is the appropriate response under Edwards v. Arizona of law enforcement officials interrogating a defendant who makes an ambiguous reference to counsel?

II.

Whether a state appellate court errs in finding an Edwards v. Arizona violation where a criminal defendant makes ambiguous statements regarding an attorney and the police officers in response discuss with the defendant the relative needs for his statement and a lawyer and as a result the defendant agrees to continue to make a statement?

THE PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The opinion of the Court of Criminal Appeals reversing the Respondent's conviction and the decision of that court denying rehearing are not yet reported and are reproduced in the appendix attached hereto.

2. The Alabama Supreme Court denied Petitioner's petition for writ of certiorari without an opinion on December 7, 1993.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals which is sought to be reviewed was entered on August 13, 1993. The order of the Alabama Supreme Court denying certiorari was entered on December 17, 1993, and this petition is filed within ninety days of said date.

This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V.

No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law...

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

AMENDMENT XIV.
Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Respondent, Gregory Allen Brown, was indicted by the Jefferson County Grand Jury during June of 1991 and charged with one count of capital murder under Ala. Code §13A-5-40(a)(7) (1975) and a second count of capital murder pursuant to §13A-5-40(a)(7) (1975). (CR. 8, 9) On June 28, 1991, Respondent was arraigned and entered a plea of not guilty. (CR. 1) On September 3, 1991, the trial court heard motions and conducted a hearing on this motion including a motion to suppress. (CR. 2) On September 13, 1991, the trial court denied Respondent's motion to suppress his statement. (CR. 2) On September 16, 1991, Respondent was tried by a jury, and on September 20, 1991, was found guilty as charged, i.e., capital murder. (CR. 2) On September 20, 1991, the jury recommended that Respondent be sentenced to life without parole. (CR. 4) On November 1, 1991, the trial court adjudged Respondent guilty as charged and in accordance with the jury recommendation sentenced Respondent to the penitentiary with life without parole.

Jerry Wayne Callahan, the victim, was the owner of a wholesale diamond business, and he also owned a 90% interest in Riverchase Jewelers, a jewelry store in Jefferson County, Alabama. (R. 472) Callahan's businesses were in serious financial trouble. Callahan owed approximately $1,100,000.00 on notes secured by his businesses. Callahan told witnesses that he could not possibly repay this debt. (R. 427, 473-476, 497, 503, 507, 511-515, 532-533)

Patrick Leo Costello, who owned the remaining 10% interest in Riverchase Jewelers, testified that Callahan had been upset over his financial situation and that Callahan had once commented that he would be better off dead. Collen Norton, who loaned Callahan a sum of $1,050,000.00, testified that Callahan had been upset over his financial situation. Ms. Norton also testified that Callahan had commented that he would be better off dead and that he was going to have himself killed. (R. 524-525, 533)

In the late afternoon of February 7, 1991, Callahan was found dead in his apartment. (R.

568, 571-572, 584-86) The cause of death was from a single hard contact gunshot wound with penetration of the left lung and heart with extensive injury to the heart. (R. 461-462)

Callahan and the Respondent were friends who had become acquainted through their gambling ventures. (R. 477, 480, 482) During their investigation of Callahan's death, Detective Peyton Zarzour and Sergeant Edward Braden of the Hoover Police Department received information that the Respondent was involved in a card game the night before Callahan's death. As a result, the investigators telephoned the Respondent and arranged a meeting with him at the Hoover Police Department. (R. 26, 756)

Meanwhile, the investigators were watching the Respondent's house. Just prior to the time for their meeting, the investigators saw the Respondent load his car with boxes and luggage and drive away in the opposite direction of the Hoover Police Department. (R. 29-30, 757-758) Suspecting that the Respondent was attempting to flee, the investigators asked Gardendale Police

officers to stop the Respondent's car a short distance away. (R. 32, 758-759)

Without entering the Respondent's car, Detective Zarzour saw a .45 caliber handgun inside the Respondent's car. (R. 34, 760) The Respondent told the investigators that he had a letter in his car that would "explain everything"; he then gave the investigators permission to enter the car to get the letter. (R. 35-36, 760-761) The letter was in Callahan's handwriting and stated:

> "I, Jerry W. Callahan, being of sound mind and body, do state that it is my wish that if certain parties are arrested for causing my death I do not wish for their prosecution. This party has enabled me to leave this life with some form of dignity and self respect. My deteriorating condition and the nonexisting chance of any survival have lead me to call on my friend for the ultimate act of friendship. Dr. Charles Clark of St. Vincent and Dr. Zeiger of Carraway can and will attest to my poor chance of any kind of decent existence in my last weeks. I did not want my family to live with the stigma that I took my own life coupled with the fact they didn't know of my condition. Please know that this act was done in the manner that I chose, which would cause myself and the above

mentioned party the least amount of suffering. Signed,

/s/Jerry W. Callahan"

(R. 37-38)

The Respondent was taken to the Hoover Police Department after being arrested. No contact was made with him until he was interviewed at the police department, with the exception of his Miranda rights being read to him at the stop sight. (R. 399, 850)

When taken to the interview room at the police station, the Respondent was again given his Miranda rights. Detective Zarzour and Braden had the Respondent read over his rights and sign a form indicating that he had read his rights. (R. 41) The Respondent indicated that he understood his rights and that, with those rights in mind, he wished to talk to the police. (R. 41) No one made any promises to Respondent, or offered him any hopes of reward or inducement in order to obtain his statement; nor did anyone tell Respondent that it would be better or worse

for him if he did or did not make a statement. No one coerced Respondent, or used any force or violence of any kind in order to obtain his statement. (R. 40, 855)

The interview process was videotaped and a copy of the videotape was given to the district attorney. (R. 41) The rights waiver form was given to Respondent and was read to Respondent and explained to him. The Respondent then signed the form. (R. 44-45)

During the oral statement, after the Respondent had waived his rights, the following conversation occurred.

After the detectives started questioning the Respondent, he mentioned something to the effect of would it make them mad if he talked to a friend of his who is an attorney. (R. 862) Detective Prier stated that they told him that it was his decision, and they gave him the opportunity to decide for himself whether to continue. (R. 863-864)

After the Respondent completed his oral statement, he gave a written statement. (R. 890,

893) While the Respondent was giving his statement, the codefendant, Gospodarek, called the Respondent's pager several times. (R. 56) At the request of the officers, the Respondent called Gospodarek and asked him whether he had gotten rid of the weapon. (R. 58, 899) Gospodarek was arrested the next day, and, pursuant to a search of the Respondent's residence (via a warrant), a notepad was found with serial numbers matching those retrieved from Callahan's home. (R. 63)

Respondent appealed, and, after both parties submitted briefs and presented oral arguments, the Alabama Court of Criminal Appeals issued an opinion on August 13, 1993, reversing and remanding this case. (Appendix A)

The Petitioner, the State, applied for rehearing and submitted a Rule 39(k) motion and brief in support thereof. The Alabama Court of Criminal Appeals overruled the Petitioner's application for rehearing and Rule 39(k) motion without an opinion on September 30, 1993.

The Petitioner sought review of the Alabama Court of Criminal Appeals' decision and opinion by filing a petition for a writ of certiorari in the Alabama Supreme Court. The Alabama Supreme Court denied writ without an opinion on December 7, 1993.

SUMMARY OF THE ARGUMENT

This case is one of many in which the lower courts have inconsistently interpreted Edwards v. Arizona, 451 U.S. 477 (1981), with regard to the appropriate response of law enforcement officials interrogating a criminal defendant who makes an ambiguous reference to a lawyer. This case presents a good opportunity to resolve this important conflict concerning whether an interrogation must cease when a defendant makes reference to a lawyer which is less than an outright request.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTS AMONG THE LOWER STATE AND FEDERAL COURTS AS TO WHAT IS THE APPROPRIATE RESPONSE UNDER EDWARDS V. ARIZONA OF LAW ENFORCEMENT OFFICIALS INTERROGATING A DEFENDANT WHO MAKES AN AMBIGUOUS REFERENCE TO COUNSEL?

In this case, the Petitioner, the State of Alabama, asks this Court to grant a writ of certiorari to review the question of what is the appropriate response of law enforcement officials interrogating a criminal defendant who makes an ambiguous reference to a lawyer. In Edwards v. Arizona, 451 U.S. 477 (1981), this Court held that a defendant invoking his Fifth Amendment right to counsel during a custodial investigation may not be subjected to further interrogation until counsel was made available to him or unless he subsequently initiates communications indicating a waiver of his right to counsel. However, as three members of this Honorable Court have recently noted,

> While easily stated, the Edwards rule has not always been easy to apply. In

> particular, the question of how officials conducting an interrogation ought to respond to a defendant's ambiguous or equivocal assertion of the right to counsel has divided the state and federal courts. The Court should take this opportunity to resolve this important constitutional question."

Mueller v. Virginia, ___ U.S. ___, 113 S.Ct. 1880, ___ L.Ed.2d ___ (1993), (dissenting opinion). As Justices White, Blackmun and Souter noted in Mueller, nearly a decade ago, this Court acknowledged the existence of three "conflicting standards" used by federal and state courts to determine the proper response a law enforcement officer should make to an ambiguous request for counsel during custodial interrogation. A review of the cases cited in the dissent in Mueller as well as other cases, including the one sub judice[1], reveals that a conflict still

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[1]It appears the Alabama appellate courts have adopted the third recognized method of dealing with ambiguous requests as the Court of Criminal Appeals adhered to the holdings of the Fifth and the Eleventh Circuit Court of

(Footnote Continued)

exists in the lower courts. This Court has not yet adopted any single approach for dealing with an equivocal or ambiguous request for counsel during custodial interrogation, leaving this decision to each jurisdiction. See, Smith v. Illinois, 469 U.S. 91, 96 (1984).

On November 1, 1993, this Court granted certiorari in United States v. Davis, 36 M.J. 337 (C.M.A. 1993), to review a similar issue regarding a defendant's ambiguous invocation of his right to counsel and to what extent interrogators may clarify a defendant's statement. In Davis, the lower court also noted the conflict among lower courts as to the proper approach to take in response to an ambiguous reference to counsel. Id. at 341.

(Footnote Continued)
Appeals in Thompson v. Wainwright, 601 F.2d 768, 771 (5th Cir. 1979); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir. (en banc), cert. denied, 444 U.S. 981 (1979); Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988).

In view of this Court's granting of certiorari in Davis and the well reasoned dissent in Mueller, it is apparent that this Court is amenable to resolving the confusion surrounding the proper response under Edwards to an ambiguous request for counsel. Therefore, in view of the serious repercussions attendant in the case sub judice (a capital murder case), it is urgent that this Court grant certiorari in this case so that the issue may be resolved equitably in that the parties in this case will be treated no differently than those similarly situated in a different legal jurisdiction.[2]

---

[2]"As it is apparent that a substantial number of criminal defendants who are identically situated in the eyes of the Constitution have received and will continue to receive dissimilar treatment because of the different approaches taken by the lower courts. ..." Mueller v. Virginia, ___ U.S. at ___, 113 S.Ct. at 1881, ___ L.Ed.2d ___ at ___ (dissenting opinion).

II.

A STATE APPELLATE COURT DOES ERR IN FINDING AN EDWARDS V. ARIZONA VIOLATION WHERE A CRIMINAL DEFENDANT MAKES AMBIGUOUS STATEMENTS REGARDING AN ATTORNEY AND THE POLICE OFFICERS IN RESPONSE DISCUSS WITH THE DEFENDANT THE RELATIVE NEEDS FOR HIS STATEMENT AND A LAWYER AND AS A RESULT THE DEFENDANT AGREES TO CONTINUE TO MAKE A STATEMENT.

As noted in the preceding issue, there are three recognized approaches to responding to an ambiguous reference to counsel in a custodial interrogation. Assuming arguendo that the approach followed by the Alabama Court of Criminal Appeals in this case is the one ultimately determined appropriate by this Court, the state appellate court misinterpreted and misapplied the law it expressly stated it adhered to by its decision in this case.

The law the Alabama Court of Criminal Appeals set forth as controlling was as follows:

> "'When a defendant makes an equivocal request for an attorney during a custodial interrogation, "the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified." Thompson v.

Wainwright, 602 F.2d 768, 771 (5th Cir. 1979) (emphasis in original); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir.) (en banc), cert. denied, 444 U.S. 981, 100 S.Ct. 485, 62 L.Ed.2d 409 (1979). Any statement taken by the state after the equivocal request for counsel is made, but before it is clarified as an effective waiver of counsel, violates Miranda.' Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988)."

(Court of Criminal Appeals opinion, pp. 8-9)

In the present case, the investigators adequately observed the above stated procedure as evidenced by the following excerpts of the questioning:

"Q. (By Sgt. Braden) From the very start.

"Q. (By Det. Zarzour) From the very start. From the time he gave you the letter --

"A. [appellant] Okay.

"Q. Go ahead.

"A. Is it going to piss ya'll off if I ask for my -- to talk to a friend that is an attorney. I mean, I'm going to do whatever I have got to do. Don't get me wrong.

"Q. Well, I understand that. I understand what you are saying.

"A. You have got to realize, man, I'm ... scared to death.

"Q. Well, and rightfully so. I don't blame you one bit because there's a serious problem here, but if you didn't pull the trigger, then we need to know what exactly happened, okay?

"Q. (By Sgt. Braden) It's up to you, Greg, whatever you want to do. Like he said.

"A. Listen, I don't know what exactly happened. I was not there.

"Q. Okay.

"Q. We know you met -- we know you met him over at Pick-a-Pack, we know ya'll left, we know you brought him back. We know all that. We know where you were, we have got people that have seen you, we know. It's like I told you earlier, we already know.

"Q. (By Det. Zarzour) That's why I said don't beat around the bush, let's get to it and get it over with.

"A. All right. ..."

(R. 33)

In the present case, the police followed the proper procedure by attempting to clarify the request and affording the Respondent an opportunity to contact counsel if that was his intent or desire. Sergeant Braden specifically

stated "It's up to you Greg, whatever you want to do. Like he said."

The Respondent's limited and, at most, equivocal reference to counsel was clarified in two ways, indicating his decision to speak to them without calling his friend, the lawyer. First, the Respondent immediately followed his reference to calling counsel with a clear statement of his intent to cooperate by continuing the questioning when he said "I mean I'm going to do whatever I have got to do. Don't get me wrong." His second indication of his intent to answer questions came after the police indicated it was up to him to do whatever he wanted (i.e. regarding the calling of counsel), and Respondent responded with a statement about the crime, when he said "Listen, I don't know what exactly happened, I was not there." In other words, in this latter instance the Respondent launched into a statement regarding the substantive crime not just about some general topic. Thus, this situation is one where in essence the Respondent was given the alternative

of speaking or not without an attorney and he chose the former. See, Connecticut v. Barrett, 479 U.S. 523, 529 (1987) (wherein this Court noted that the defendant's limited requests for counsel were accompanied by affirmative announcements of his willingness to speak with the authorities).

CONCLUSION

This Court should grant the State's petition and proceed to hear the merits of the issue raised.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

Beth Slate Poe

BETH SLATE POE
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE PETITIONER

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APPENDIX

APPENDIX A

[STAMP] RELEASED AUG. 13, 1993

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1992-93

CR-91-0215

GREGORY ALLEN BROWN

v.

STATE

APPEAL FROM JEFFERSON CIRCUIT COURT
(CC-91-2136)

MONTIEL, JUDGE

The appellant, Gregory Allen Brown, was indicted for murder, made capital because it was accomplished pursuant to a contract. See §13A-5-40(a)(7), Code of Alabama 1975. The jury found the appellant guilty as charged in the indictment and recommended that he be sentenced to life imprisonment without parole. The trial court accepted the jury's recommendation and sentenced the appellant to life imprisonment without the possibility of parole.

The evidence presented by the State tends to establish the following. Jerry Wayne Callahan,

the victim, was the owner of a wholesale diamond business and owned a 90% interest in Riverchase Jewelers, a jewelry store in Jefferson County, Alabama. The evidence tended to show that the business owned by Callahan were in serious financial trouble. The appellant owed approximately $1,100,000 on notes secured by the businesses, which he told witnesses he could not pay.

The appellant was a friend of Callahan's and became acquainted with him through gambling ventures. The appellant was the dealer in high stakes card games in which Callahan participated. Witnesses for the State testified that the appellant and Callahan had participated in a card game on the night of February 6, 1991, and that Callahan had won $15,000. The following day, February 7, 1991, the appellant paid Callahan $9,000 of the money that he had won at the card game.

Pat Costello, who owned the remaining 10% interest in Riverchase Jewelers, testified that Callahan had been upset over his financial

situation and that he once commented that he would be better off dead. He testified that Callahan did not come into the store on February 7, 1991, the day of Callahan's death. He said that on that day the appellant had come to the store twice, once to pick up a large diamond ring, the appraised value of which was $15,600, and the next time to pick up paper-work regarding the ring. According to Costello, Callahan had instructed him to give the appellant these items and the appellant did not pay for the ring.

A neighbor who lived near Callahan testified that between 3:30 and 4:00 p.m., he heard a knock on his door. When he opened the door, he saw an individual, who he described as being the approximate height and weight of Robert Gospodareck, a co-defendant in this case, walking down the stairs. Another neighbor testified that between 3:00 and 4:00 in the afternoon of February 7, 1991, she heard a loud "bang." On that same day, a woman who had occasionally dated Callahan discovered his body in his apartment. Callahan had been shot once through the heart.

Jerry Noto, the owner of a local convenience store, testified that the appellant had been in his store on two times on the day of Callahan's death. The first time the appellant came into the store, he was displaying the diamond ring. According to Noto, the appellant left the store and returned with Gospodareck. Witnesses testified that the appellant and Gospodareck were at the store between 4:30 and 5:00 on the afternoon of the killing. According to the witnesses, the appellant talked with Gospodareck for a short while and then Gospodareck left the store. Noto testified that the appellant appeared nervous. Testimony established that Callahan's apartment was near Noto's store.

During their investigation of Callahan's death, investigators with the Hoover Police Department, Detective Peyton Zarzour and Sergeant Edward Braden, received information that the appellant was involved in the card game that took place the night before Callahan's death. The investigators contacted the appellant by telephone to arrange a meeting with him at the

Hoover Police Department to discuss their investigation. The appellant agreed to meet with the investigators. As the time of the meeting approached, the investigators were watching the appellant's home. The investigators saw the appellant load his vehicle with luggage and boxes. The appellant then got into his vehicle and drove toward Fultondale, Alabama, in the opposite direction of the Hoover Police Department. The investigators suspected that the appellant was attempting to leave town without meeting with them and they asked Gardendale police officers stop the appellant's vehicle. Once they stopped the vehicle, the Gardendale police called the investigators to the scene. The appellant assured them that he still planned to meet with them as he them [sic] earlier he would.

Zarzour, without entering the vehicle, saw a .45 caliber handgun inside the appellant's vehicle. The appellant told the investigator that Callahan had given him the gun. The appellant then told the investigators that he had

a letter that would explain everything. The appellant permitted the investigators to enter his car and get the letter. The letter was handwritten and stated:

> "I, Jerry W. Callahan, being of sound mind and body, do state that it is my wish that if certain parties are arrested for causing my death I do not wish for their prosecution. This party has enabled me to leave this life with some form of dignity and self respect. My deteriorating condition and the nonexisting chance of any survival have lead me to call on my friend for the ultimate act of friendship. Dr. Charles Clark of St. Vincent and Dr. Zeiger of Carraway can and will attest to my poor chance of any kind of decent existence in my last weeks. I did not want my family to live with the stigma that I took my own life coupled with the fact they didn't know of my condition. Please know that this act was done in the manner that I chose, which would cause myself and the above mentioned party the least amount of suffering.

The note was signed by Callahan. At trial, a handwriting analyst testified that in his opinion the note was written by Callahan.

The appellant was then read his Miranda rights, was placed under arrest, and was taken to the Hoover police station. The appellant was

again read his Miranda rights before any statements were taken. The appellant indicated that he understood his rights, and he signed a waiver of rights form and a consent to search form. The appellant's statement was videotaped. After the appellant made his videotaped statement, he made a written statement. In his statements, the appellant explained his participation in the offense and implicated Gospodareck in the shooting of Callahan.

A forensics expert testified that an autopsy on Callahan did not reveal any life threatening illness that would, in the near future, cause Callahan's death. Also, the testimony reflected that the doctors named in Callahan's note had not treated Callahan for any life threatening illness.

I

The appellant argues that the trial court erred in failing to suppress the statements he made to the detectives. Specifically, the appellant argues that the statements were

obtained in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Edwards v. Arizona, 451 U.S. 477, 102 S.Ct. 1880, 68 L.Ed2d 378 (1981), because, he says, during the course of giving his videotaped statement, the appellant requested that he be allowed to speak to an attorney and the officers did not provide him with counsel nor did they clarify his request for counsel before continuing with their interrogation.

The transcript of the videotaped statement of the appellant shows that the following conversation took place:

> "Q. (By Sgt. Braden) From the very start.
>
> "Q. (By Det. Zarzour) From the very start. From the time he gave you the letter --
>
> "A. [appellant] Okay.
>
> "Q. Go ahead.
>
> "A. Is it going to piss ya'll off if I ask for my -- to talk to a friend that is an attorney. I mean, I'm going to do whatever I have got to do. Don't get me wrong.
>
> "Q. Well, I understand that. I understand what you are saying."

"A. You have got to realize, man, I'm ... scared to death.

"Q. Well, and rightfully so. I don't blame you one bit because there's a serious problem here, but if you didn't pull the trigger, then we need to know what exactly happened, okay?

"Q. (By Sgt. Braden) It's up to you, Greg, whatever you want to do. Like he said.

"A. Listen, I don't know what exactly happened. I was not there.

"Q. Okay.

"Q. We know you met -- we know you met him over at Pick-a-Pack, we know ya'll left, we know you brought him back. We know all that. We know where you were, we have got people that have seen you, we know. It's like I told you earlier, we already know.

"Q. (By Det. Zarzour) That's why I said don't beat around the bush, let's get to it and get it over with.

"A. All right. ..."

Before this colloquy, the appellant made no incriminating statements. After this colloquy, the appellant gave investigators information regarding the death of Callahan. After the appellant gave the videotaped statement, the appellant then made a summarized written

statement. We agree with the appellant that both statements were due to be suppressed.

In Miranda, the United States Supreme Court held that under the Fifth Amendment, an accused has the right to counsel during custodial interrogation. In Edwards, our Supreme Court expounded on the accused's Fifth Amendment rights and held:

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges or conversations with the police."

451 U.S. at 484 (footnote omitted).

In this case, the appellant's request to speak to a friend who is also an attorney was clearly an invocation of his right to counsel. Further interrogation by the investigators

without

providing the appellant the opportunity to confer with an attorney violated the appellant's Fifth Amendment rights as discussed in Miranda and Edwards.

The State argues in its brief that, "At most, the comments made by Appellant could be considered an equivocal invocation of his right to counsel." However, even if we assumed that the appellant's request to speak to an attorney was equivocal or ambiguous, the failure of the investigators to clarify his request to speak to his attorney still violates Miranda. In Robinson v. State, 574 So.2d 910, 914 (Ala. Crim. App. 1990), we adhered to the holdings of the Fifth Circuit and Eleventh Circuit Courts of Appeals:

> "'When a defendant makes an equivocal request for an attorney during a custodial interrogation, "the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified." Thompson v. Wainwright, 601 F.2d 768, 771 (5th Cir. 1979) (emphasis in original); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir.) (en banc), cert. denied, 444 U.S. 981, 100 S.Ct. 485, 62 L.Ed.2d 409 (1979).

> Any statement taken by the state after the equivocal request for counsel is made, but before it is clarified as an effective waiver of counsel, violates Miranda.' Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988)."

Contrary to the State's argument, we hold that at the very least the appellant's comment was an equivocal request to speak to counsel. Additionally, we conclude that the investigators did not clarify the appellant's request to confer with counsel. Rather, the investigators continued their interrogation as if the request to speak with counsel had not been made, telling the appellant how serious the matter was, prodding him to provide more information, and ignoring the requirement that their inquiries after the appellant's request was made be specifically limited to clarifying that request. Thus, regardless whether the appellant's request to speak to his friend who is an attorney is considered a clear request or is considered an equivocal request, the investigators' failure to respond to or to clarify that request nonetheless violated the appellant's Fifth Amendment rights.

Because the appellant's statements were obtained in violation of his Fifth Amendment rights, the statements obtained after his invocation of his right to confer with counsel were due to be suppressed.

II

The appellant further argues that his statements were due to be suppressed because they were not voluntarily made and were obtained by unlawful inducements. Because we are holding that the appellant's statements were due to be suppressed for the reasons set forth in part I of this opinion, we need not address this argument.

The judgment of the trial court is due to be, and it is hereby, reversed and this case is hereby remanded for a new trial.

REVERSED AND REMANDED.

All Judges concur.

FILED

931510 JUN - 6 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER,

v.

GREGORY ALLEN BROWN,

RESPONDENT.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION TO PETITION BY STATE OF ALABAMA IN BEHALF OF RESPONDENT GREGORY ALLEN BROWN

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14 pp

THE PARTIES

Respondent agrees with Petitioner that all of the parties to the Proceeding in the Court's below are contained in the captions of both the Writ of Certiorari filed by the State and Respondent's reply thereto.

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STATEMENT OF THE CASE

The Respondent generally agrees with the statement of the case as presented in the State of Alabama's Petition for Writ of Certiorari, however, there is one clear error which must be noted. On page seven(7) thereof, the State asserts that "No one made any promises to the Respondent, or offered him any hopes of reward or inducement in order to obtain his statement; nor did anyone tell Respondent that it would be better or worse for him if he did or did not make a statement.

The following representative examples of promises made should suffice to make the print:

1. "Now what you tell us and what you help yourself is up to you Greg, not us. If you didn't pull the trigger you

need to tell us .... the degree of heat your going to get is up to you Greg." (Page 29 of Exhibit 8 in Trial Record).

2. .... " we have got to have .... we have got to have you have you help yourself and if you are honest with us and you come through this stuff .... let's talk (Page 31 of Record Exhibit 8).

3. .... "but what I'm telling you is the quicker we get this done, the better it is going to be for you." (Page 31 of Exhibit 8 in Record).

These examples of implied and express promises of favorable treatment in return for a statement totally contradict the assertions in the State's writ. In fact, their inducements were a part of the Respondents State appeal which he felt was equally constitutionally compelling with respect to the exclusion of the confession

in question, the Alabama Court of Criminal Appeals specifically did not address the argument because of its perception that Edwards v. Arizona, 451 U.S. 477 (1981), properly applied, was conclusive on the same issue. (See page 34, Appendix A of State's petition for Certiorari).

SUMMARY OF THE ARGUMENT

This case is one which is so clear on its facts that it presents no real problem with regard to the actual inappropriateness of law enforcement officials response to a request for an attorney made during interrogation under the basic tenets of Edwards v. Arizona, 451 U.S. 477 (1981).

ARGUMENTS

I

Should this Court grant Certiorari to resolve averred conflicts among lower State and Federal Courts as to what is an appropriate response by law enforcement officials under Edwards v. Arizona while interrogating a defendant who makes a direct request for counsel?

In the instant case, the State of Alabama has chosen to present the issue as if the defendant had made an ambiguous reference to a lawyer and, thus, bring the question within the purview of those cases where this Court has noted "conflicting standards" being used by State and Federal courts for determining the consequences of ambiguous or equivocal assertions of the right to counsel by criminal defendants prior to their being interrogated, see

Smith v. Illinois, 469 U.S. 91, 83 L.Ed.2d. 488, 105 S.Ct. 490(1984), thus attempting to take advantage of language contained in a dissenting opinion by Justices White, Blackmon and Souter in the memorandum decision of Mueller v. Virginia, __U.S.__, 113 S.Ct. 1880, 123 L.Ed.2d. 498 (1993).

Respondent respectfully suggests that the instant case is of such a factual circumstances that no review is needed since, under any standard, the request for counsel was direct and unequivocal to the degree that the principles enunciated in Edwards, supra, comes into play without serious question. There is likewise no real issue concerning the extent to which interrogators may clarify a defendant's ambiguous invocation of his right to counsel as the State of Alabama suggests in citing United States v. Davis, 36 M. J.

337 (C.M.A. 1993) (Petition page 13).

In the present case, the defendant-respondent, who was admittedly terrified asked the interrogating officers if they were going to be mad if he asked to talk to an attorney, they simply agreed that he was frightened and should be and continued urging him to answer questions (R.33). Fortunately, the statement was videotaped and no one can plausibly contend anything other than that a frightened person asked if he would anger anyone by asking to see an attorney. This request-question was never directly answered, and the questioning continued in an interrogating fashion.

The State completely missed the thrust of this Court's holding in Smith, supra. Where the request for counsel is direct (would you mind if I talk to an attorney) and the questioning continues

unabated (which it did) then the remedy of Edwards, applies no matter what standard is used and this writ is not really needed to help clarify any real problem when review is limited to the uncontroverted facts.

The Alabama Appellate Court found a clear invocation of the right to counsel, it merely hypothesized that a lesser indication would have led to the same result if it accepted the State of Alabama's contention (which it did not).

II

The State contends that a court errs if it allows an ambiguous request for an attorney to vitiate a statement, when the police respond and discuss with the defendant the relative need for a statement and a lawyer and as a result the defendant argees to continue making a

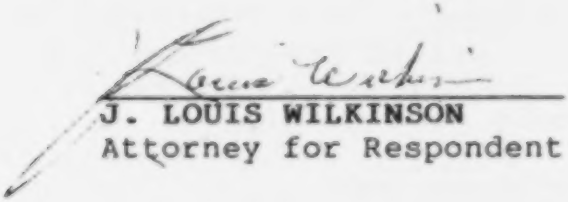
statement.

Respondent's counsel is simply unable to find in the record anything which vaguely resembles such a clarification. What the police did was agree that he had a serious problem and needed to tell them who pulled the trigger. Another officer said it was up to him like the first officer had said. In other words, who pulled the triggger? No one even used the word lawyer, friend, counsel or advice, save for the defendant. The interrogation simply continued. Petitioner's position is simply unsupportable when the transcript (as the state sets it out) is read in context.

CONCLUSION

This court should deny the State's petition without further consideration.

Respectfully submitted,



J. LOUIS WILKINSON
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